TENNECO OIL COMPANY

IBLA 74-220 Decided September 27, 1974

Appeal from decisions of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease offers M 26836 (SD) and M 26837 (SD) in part, due to conflict with simultaneously-filed offers that drew higher priority in a public drawing.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Applications: Filing--Oil and Gas Leases: Noncompetitive Leases

   Under the Department of the Interior's regulations, priority between simultaneously-filed over-the-counter oil and gas lease offers that conflict in part is properly determined by a public drawing which includes all lease offers containing interrelated conflicts, rather than a separate drawing for each parcel in conflict.

APPEARANCES: James D. Voorhees, Esq., of Moran, Reidy & Voorhees, Denver, Colorado, for appellant; Loretta C. Douglas, Esq., Office of the Solicitor, U. S. Department of the Interior, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On December 17, 1973, as of 10 o'clock a.m., appellant Tenneco Oil Company, hereinafter Tenneco, filed noncompetitive oil and gas lease offers M 26836 (SD) and M 26837 (SD) for lands in T. 14 N., Rs. 1 and 2 E., B.H.M., South Dakota. On the same date and time, Webb Resources, Inc., which has not appeared in this appeal, filed noncompetitive oil and gas lease offers M 26839 (SD), M 26840 (SD) and M 26841 (SD) for lands in the same townships, including various parcels in Tenneco's offers.

The conflicts among the offers were as follows:

Webb Resources, Inc.	Tenneco Oil Co.
M 26841 (R. 2 E.)	M 26837 (R. 2 E.)
§ 28: W 1/2 W 1/2, E 1/2 E 1/2, NE 1/4 NW 1/4	§ 28: All
§ 29: W 1/2, W 1/2 E 1/2	§ 29: All
	M 26836 (R. 2 E.)
§ 30: Lots 1, 2, 3, 4, E 1/2 W 1/2	§ 30: Lots 1, 2, 3, 4, E 1/2 W 1/2, E 1/2
M 26840 (R. 2 E.)	
§ 31: Lots 1, 2, 3, 4, E 1/2 W 1/2, E 1/2	§ 31: Lots 1, 2, 3, 4, E 1/2 W 1/2, E 1/2
M 26839 (R. 1 E.)	(R. 1 E.)
§ 25: E 1/2	§ 25: All

On December 26, 1973, the Montana State Office, Bureau of Land Management (BLM), held one drawing in which all five lease offers above were included, and in which the offers were drawn as follows: (1) M 26841 (Webb); (2) M 26837 (Tenneco); (3) M 26840 (Webb); (4) M 26839 (Webb); and (5) M 26836 (Tenneco). Tenneco's offer M 26837 conflicted with M 26841 which drew higher priority, but did not conflict with the other Webb offers. Tenneco's other offer, M 26836, conflicted with the three Webb offers, all of which drew higher priority. Consequently, the priority schedule resulted in the issuance of leases to Webb Resources including all the lands in conflict, and decisions rejecting Tenneco's offers to lease to the extent of the lands in conflict.

On appeal, Tenneco argues that the method of drawing used by the BLM violated the "plain language" and "plain intent" of the regulations governing simultaneous offer drawings, and unfairly gave Webb Resources a higher probability of priority in the drawing. Tenneco argues that fairness and regulation 43 CFR 3110.1-6(a) require that a drawing be held "as to each conflict" involving separate lease offers, i.e., that there be a drawing for each parcel or group of parcels for which conflicting lease applications were filed.

The Office of the Solicitor, on behalf of the BLM, appeared in answer to the appeal. The Solicitor argues that the regulation does not support appellant's argument, and that the long-standing practice of the BLM does in fact "resolve the priority to the extent of the conflict between the two offerors," as required by the regulation. The Solicitor argues that appellant has shown no unfairness, only the

bad luck of being drawn second on the parcel for which Webb Resources' offer was drawn first, and having its other offer drawn last.

There are two procedures now provided for by the regulations to determine priorities of simultaneously-filed noncompetitive oil and gas lease offers. One procedure is applicable where lands in leases which are canceled, relinquished, or terminated by operation of law become available when notice of their availability is posted in the proper BLM Office. 43 CFR 3112.1-1, 1-2. The posted list describes the lands by leasing units identified by parcel numbers. 43 CFR 3112.1-2. Offers to lease the designated leasing units are submitted on a special "Simultaneous Oil and Gas Entry Card;" only one complete leasing unit, identified by parcel number, may be included in one entry card; and an offeror is permitted to file only one offer to lease each numbered parcel on the posted list or all his offers for that parcel are disqualified. 43 CFR 3112.2-1. If less than three entry cards per parcel have been filed all cards are drawn to determine priority; if more than that number are filed three entry cards are drawn for each numbered leasing unit to fix the order in which the successful drawee is determined. Id. Under this special procedure, although an offeror may file only one offer for each listed parcel, he may file an offer for each parcel listed if he so desires and complies with the regulations.

The other procedure is applicable to regular, or "over-the-counter," filings not subject to the posting requirements and special simultaneous-filing procedure described above. This procedure is governed by regulation 43 CFR 3110.1-6(a), which both parties agree is applicable here. This regulation provides in pertinent part:

> * * * Offers to lease which cover lands subject to regular filings which are received in the same mail or over the counter at the same time, will be considered as having been filed simultaneously and priority to the extent of the conflicts between them will be determined by a public drawing.

Under both of these procedures the drawing is conducted to determine the priorities among conflicting lease offers. Under the special procedure prescribed by 43 CFR 3112 the parcels of land are designated by BLM, and the offers must comport with such designation. In a regular filing situation, however, conflicts may not be so neatly resolved and limited to a particular parcel. Other than such requirements as proper land description, compactness, and minimum acreage, the Bureau has not prescribed how an offeror may designate which land should be in an offer or offers. Thus, under ordinary

circumstances, the conflicts between applicants filing at the same time is a matter of happenstance. There may be reasons why each offeror may choose to select particular land in particular offers. There could be an extremely wide range of variable combinations of conflicts where offers are filed at the same time. As the Solicitor contends, there would be administrative difficulties if the BLM adopted appellant's contention that there must be a separate drawing as to each parcel in an offer in conflict in a regular filing situation. It would require separate drawings in certain circumstances of very small parcels of land or even fractional interests in such parcels and greatly enhance the number of drawings with attendant administrative problems. We do not read the regulation as imposing such an administrative burden.

[1] The language of regulation 43 CFR 3110.1-6(a) supports the Solicitor's position. Rephrased, it says that "a public drawing" will be held to determine "priority to the extent of the conflict between [offers]." The syntax indicates that the drafters of the regulation did not contemplate a drawing for each parcel in conflict, but for the offers in conflict. The language "priority to the extent of the conflicts," upon which appellant's reading relies, refers only to the fact that priority is not established in such a drawing for lands not contained in more than one offer. Cf. Duncan Miller, 5 IBLA 35 (1972). 1/

We fail to see how the BLM's drawing procedure is unfair. The fact that Webb Resources had three offers in the drawing and appellant only two does not demonstrate any unfairness. If either had designated the lands by another combination in different offers, its chance as to a given parcel of land would have been the same, but a different result may have been attained. As long as each offer complied with the other regulatory requirements, and as long as there were no multiple filings by one party for the same parcel, cf. Richard Donnelly, 11 IBLA 170 (1973); Schermerhorn Oil Corp., 72 I.D. 486 (1965), the drawing was fair. The number of lease

1/ In that case, this Board held that the regulation providing that offers cannot be withdrawn after the drawing does not apply if the offer is the only one for that parcel, i.e., the drawing does not affect the offer insofar as it is a regular filing containing no conflict with any other. 5 IBLA at 36.

offers in the drawing is a matter of coincidence in how the lands are described in the offers which does not affect the fairness of the drawing in determining priority for each conflicting parcel in regularly filed offers.

The only case which has come to our attention in any way supportive of appellant's position is Henry S. Morgan, 66 I.D. 278 (1959). In that case applications within three different groups conflicted with each other in the group but did not conflict with any applications in the other two groups. The decision held that it was not proper to combine all the groups of applications in the same drawing because the following regulatory provisions required a drawing only as to the applications which were in conflict within a group:

> Where applications or offers received by mail or filed over the counter at the same time are in conflict, the right of priority will be determined by public drawing in the manner provided in § 295.8(b) of this chapter.

43 CFR 191.10 (1959). (Emphasis added.)

> All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

43 CFR 295.8(b) (1959).

Regulation 43 CFR 3000.6-1(a) now contains the language in the first paragraph quoted above, except it eliminates the underlined phrase. A new subparagraph refers only to applications or offers made and filed in accordance with 43 CFR 3112.2-1, the special simultaneous filing procedure, and refers to a public drawing "in the manner provided in § 1821.2-3." That regulation refers to documents simultaneously filed. Subdivision (b) now provides:

> Whenever it is necessary, for the purposes of the regulations in this chapter, to determine the order of priority of consideration among documents which have been simultaneously filed, such order of priority will be established by a drawing open to public view.

Not only have the regulations been renumbered and rearranged since Morgan, but there have been changes in the language. This

is especially true in the addition of 43 CFR 1821.2-3(b), quoted above, and 43 CFR 3110.1-6(a) quoted previously. It is unnecessary to determine whether these regulatory changes would now affect the factual circumstances in Morgan, or whether that decision was correct under the regulations at that time. Morgan is distinguishable on the facts alone, despite broad dictum in the case. It dealt only with a situation where the three different groups of applications were combined in a drawing although they conflicted only with others in the same group. In defining conflicting applications, it was stated, 66 I.D. at 280:

> * * * Applications which conflict are those which are incompatible or mutually inconsistent because some or all of the same lands are applied for by more than one applicant, and where applicants are not competing with one another for a lease on all or part of the same land, their applications are not in conflict within the meaning of the above-quoted regulations.

In the present case, the five offers have interrelated conflicts and no group of offers included in the drawing is independent of conflict with any other group or pairing of offers. The rationale of the Morgan case is therefore not applicable here and will not be extended to cover this situation.

The application of the regulations by the BLM accords with the purpose and terms of section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226(a) (1970), providing for noncompetitive leasing of lands not within a known geological structure of a producing oil and gas field. As stated in Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257, 259 (D.C. Cir. 1963):

> [The discretion granted to Secretary by the Mineral Leasing Act] does not mean that the Secretary is permitted to grant a lease to one other than "the person first making application." It does mean that the Secretary is to determine who that first person is.

Compare King v. Udall, 266 F. Supp. 747, 749 (D.D.C. 1967). The regulation involved in this case, as construed and applied by the BLM, complies with the Department's discretion and duty in this regard without unfairness to the parties to the drawing. The appellant has failed to demonstrate that the BLM's drawing system violates the regulations or results in unequal probabilities of success as to conflicting parcels between simultaneously-filed

offers. Schermerhorn Oil Corp., supra at 490. See McKay v. Wahlenmaier, 226 F.2d 35, 41-42 (D.C. Cir. 1955).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge